FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of:

The Petition For Declaratory Ruling of Express Consolidation, Inc. a Florida corporation,

CG Docket No. 02-278

STATE OF FLORIDA'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND OTHER GROUNDS

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INTRODUCTION

State of Florida, Florida of Agriculture and Consumer Services, ("Florida") is a state regulatory agency and the enforcing authority of Section 501.059, Florida Statutes. Florida filed an action against Defendant, Express Consolidation, Inc., for violation of Section 501.059, Florida Statutes ("No-Sales Statute"). Florida, pursuant to Section 501.059(4), Florida Statutes maintains a list of telephone numbers of consumers that do not want to receive telephone solicitation calls from telephone solicitors or telemarketers. These consumers pay Florida an annual fee to have their telephone number appear on this list. The list is referred to as the "no sales solicitation" list. The No-Sales Statute (§501.059(4), Fla. Stat.) prohibits unsolicited telephonic sales calls to be made to persons whose numbers appear on the list published by Florida.

Further, Section 501.059(7), Florida Statutes makes it unlawful for a telemarketer to make, or cause to be made, a telephonic sales call and use, or knowingly allow, an automated dialing system for the selection and dialing of telephone numbers or playing a recorded message when the number called is answered.

Florida received numerous complaints from consumers that Express Consolidation, Inc., was violating Florida's statutes by making, or causing to be made, unsolicited telephonic sales calls to persons whose name were on the state's no sales solicitation call list and playing, or causing to be played, a recorded messages when the number called was answered. Florida filed an action for injunction and civil penalty. Defendant filed a motion to remove the case to Federal Court on the grounds that TCPA pre-empted Florida statute regarding do-not-call and recorded message violations. Florida filed a Motion to Remand. After due consideration the Federal Court remanded

the case to state court. During the pendency of Florida's action against Defendant, Defendant filed a Petition For A Declaratory Ruling with the FCC dated July 13, 2004. Florida was not served with a copy of such Petition and was unaware such a Petition was filed until September 23, 2004. Further, Defendant raised the issue of preemption in the State court proceeding and that matter is now pending before the circuit court of the State of Florida.

Florida alleges in paragraph 5 of the Complaint filed against Defendant in state court that Defendant violated the No-Sales Statute by calling, or causing calls to be made, persons whose names appeared the then-current no-sales solicitation call list. Florida further alleges in its Complaint that Defendant played, or knowingly allowed to be played, a recorded message when the number called was answered.

There are no allegations in Florida's state court Complaint that the telephonic sales calls referred to in such Complaint are intrastate or interstate calls.

SOVEREIGN IMMUNITY BARS FCC FROM HEARING THIS MATTER

ISSUE

The FCC does not have jurisdiction in this matter because the State of Florida's sovereign immunity protects it from being brought before a federal administrative tribunal. See Federal Maritime Commission v. South Carolina State Port Authority, et al., 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

ARGUMENT

The FCC does not have jurisdiction in this matter because the State of Florida's sovereign immunity prohibits the Federal Administrative Agency from hearing this matter.

In the case of Federal Maritime Commission v. South Carolina State Ports Authority, et al. 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002) the United States Supreme Court upheld a State's jurisdictional challenge of a Federal Administrative Agency's jurisdiction on the grounds of sovereign immunity. The Federal Maritime Commission sought to take administrative action against South Carolina State Port Authority upon the complaint of a cruise ship company. In finding the Federal Administrative Agency did not have jurisdiction to hear the case the United States Supreme Court held:

> "It is for this reason, for instance, that sovereign immunity applies regardless of whether the private Plaintiff's suit is for monetary damages or some other type of relief. See *Seminole Tribe,* 517 U.S., at 58, 116 S. Ct. 1114 ('[W]e have often made it clear that the relief sought by a Plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment").
>
> Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."

The United State Supreme Court further held in Federal Maritime Commission, at 767-768:

> "…we noted in *Seminole Tribe* that 'the background principle of the state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area … that is under the exclusive control of the Federal Government," 517 U.S. at 72, 116 S. Ct. at 1114. Thus, '[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.' *Ibid*."

Express Consolidation, Inc.'s Petition for For Declaratory Relief is an action by a private citizen (a Florida corporation) to have a Federal Administrative Agency find that Florida's statutes are preempted by Federal law. This is an analogous factual situation giving rise to the Federal Maritime Commission case. The United States Supreme Court held that sovereign immunity prohibited the Federal Administrative Agency from proceeding against a State. The principle of the Federal Maritime Commission case would prohibit a Federal Administrative Agency from proceeding against a State by finding (upon request of a private citizen) a State's law is preempted by Federal law.

The exception of Ex Parte Young 209 U. S. 123 (1908) does not apply in this case. Ex Parte Young held that the Eleventh Amendment does not bar lawsuits that seek future equitable relief to discontinue ongoing violations of federal law by State officers. Ex Parte Young prescribed to a legal fiction that the State officers who act contrary to the Constitution or federal law strip themselves of their official capacity and thus, their derivative sovereign immunity. There are no such allegations of improper activities by the Defendant in this action.

Finally, this preemption matter is pending before the Circuit Court in the State of Florida. The State Court has jurisdiction of the matter and the Commission should allow the State Court to render its decision on the issue of preemption.

TCPA DOES NOT PREMPT STATE LAW

ISSUE

TCPA specifically provides that State law is not preempted and that States can enforce State law.

ARGUMENT

Without waiving it jurisdictional argument set forth above, Florida will show that Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") does not preempt Florida's statute. In fact, TCPA specifically provides that it does **not** preempt state law. TCPA at 47 U.S.C. §227(e) provides:

> "(1) **State law is not preempted.** Except for the standards under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations or which prohibits—
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisement;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitation."

Further, TCPA at 47 U.S.C. §227(f)(6) provides:

> "**Effect on State court proceedings**. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State."

TCPA at several points shows that it is intended to allow state court jurisdiction over interstate calls. For example, 47 U.S.C. §227(b)(3), part of the TCPA subsection dealing with misuse of automated telephone equipment, provides in part that "[a] person or entity may, **if otherwise permitted by laws or**

rules of court of a State, bring in an appropriate court of that state… an action based on a violation of this subsection or the regulations proscribed under this section…" (emphasis added). Similarly, the TCPA subsection dealing with violations of the "Do Not Call" registry provides that "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations proscribed under this subsection **may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State…**an action to recover for actual monetary loss from such violation, or to receive up to $500 in damages for each such violation, whichever is greater." 47 U.S.C. §227(c)(5) (emphasis added).

The above cited portions of TCPA reinforce the position that State law is not preempted by TCPA.

FLORIDA'S ACTION NOT COVERED BY TCPA

ISSUE

Florida Statute 501.059 involves a cause of action not encompassed within the parameters of TCPA.

ARGUMENT

Without waiving it jurisdictional argument set forth above, Florida asserts TCPA defines "telephone solicitation" as the initiation of a telephone call. TCPA also provides that it is unlawful to initiate or make the telephone solicitation to persons whose name appear on the federal do-not-call list. However, Florida's law is different. Section 501.059(4), Florida Statutes, provides:

> "No telephone solicitor shall make **or cause to be made** any unsolicited telephonic sales call to any residential, mobile or telephonic paging device telephone number, if the number for that telephone appears in the then-current quarterly listing published by the Florida." [Emphasis added]

Also, section 501.059(7), Florida Statutes, provided:

> "No person shall make **or knowingly allow a telephonic sales call to be made** if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called." [Emphasis added]

Florida in paragraph 5 its Complaint filed in State Court alleges:

> "This cause of action accrued in Orange County, Florida by virtue of Defendant making, **or causing to be made,** a telephonic sales call to consumers in Orange County, Florida and Defendant playing **or causing to be played**, a recorded message when the number called is answered. [Emphasis added]

The state cause of action is not preempted and the action against the Defendant for causing the unlawful telephone solicitation calls to be made is not covered by the TCPA.

The entity making that call and the entity causing the call to be made may be two separate entities. Thus, a Florida corporation hiring a California company to make the calls is liable for violation of Florida's statute if the California company fails or refused to obey Florida's law in the manner that such calls are made on behalf of the Florida corporation.

CONCLUSION

For the reason stated herein, the Petition filed by Express Consolidation, Inc., should be dismissed because it does not have jurisdiction because of sovereign immunity or because the State Court has taken jurisdiction of the matter of preemption and the State Court should be allowed to render its decisions.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been served on Mark H. Schlein, Esq., 215 South Monroe Street, Suite 815, Tallahassee, FL, 32301 by regular U.S. Mail, postage prepaid, on this ___ day of November, 2004

By: _____

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